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Valerie Kazich

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VALERIE KAZICH

Appeal 2010-002406
Application 10/800,225
Technology Center 1700

Before ADRIENE LEPIANE HANLON, CATHERINE Q. TIMM, and
MARK NAGUMO, *Administrative Patent Judges*.

NAGUMO, *Administrative Patent Judge*.

DECISION ON APPEAL

A. Introduction¹

Valerie Kazich (“Kazich”) timely appeals under 35 U.S.C. § 134(a) from the final rejection² of claims 1-20, which are all of the pending claims. We have jurisdiction. 35 U.S.C. § 6. We AFFIRM.

The subject matter on appeal relates to a drip guard for frozen treats, such as an ice cream bar held on a stick.

Representative Claim 1 reads:

1. An apparatus for collecting drips from a frozen treat, the apparatus comprising:
 - a base defined by a perimeter
 - wherein the base has a center point and the perimeter is equidistant from the center point
 - wherein the base has a top layer covering a bottom layer
 - wherein the base is planar
 - wherein the bottom layer is *made from a material that is rigid*
 - wherein the top layer is made from an absorbent material
 - wherein the top layer has an outer edge
 - wherein the bottom layer extends to a point outside of the outer edge of the top layer without overlapping the top layer;

¹ Application 10/800,225, *Apparatus, a System and a Method for Collecting Drips from a Frozen Treat*, filed 12 March 2004. The specification is referred to as the “225 Specification,” and is cited as “Spec.” The real party in interest is listed as Valerie Kazich, the named inventor (Appeal Brief, filed 30 June 2008 (“Br.”), 1.)

² Office action mailed 10 October 2007 (“Final Rejection”; cited as “FR”).

a lip integrally formed on the perimeter of the base
wherein the lip extends to a point *above* the top layer
wherein the lip is perpendicular to the base
wherein *the outer edge of the top layer is adjacent to the lip* without overlapping the lip; and
a passage at the center point of the base
wherein the passage forms an opening through the
top layer of the base and the bottom layer of the base.

(Br., Claims App. 1 [unnumbered]; indentation, paragraphing, and emphasis added.)

The Examiner has maintained the following grounds of rejection:³

- A. Claims 1-20 stand rejected under 35 U.S.C. §112(1) for lack of written description of a “rigid” bottom or base, and for lack of written description of a base lip that extends “above” the top layer of the drip collector.
- B. Claims 1-3, 8, 13, 17, and 18 stand rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Ackalusky,⁴ Taylor,⁵ Perkins,⁶ Pagnini,⁷ Blant,⁸ Rizzuto,⁹

³ Examiner’s Answer mailed 10 October 2007 (“Ans.”), as supplemented on 15 December 2009.

⁴ James M. Ackalusky, *Guard Device for Frozen Confection*, U.S. Patent 2,803,550 (1957).

⁵ Don A. Taylor, *Individually Packaged Frozen Confection*, U.S. Patent 2,735,778 (1956).

⁶ Jana Gaye Perkins, U.S. Patent Application Publication US 2003/0087011 A1 (8 May 2003).

⁷ Edillo Pagnini, U.S. Patent 3,306,512 (1967).

⁸ Roger John Blant, GB 2 293 751 A (1996).

⁹ Peppino Rizzuto, U.S. Patent 4,938,411 (1990).

Oshio,¹⁰ Suzuya Shokuhin,¹¹ Smith¹² Goodwin,¹³ Miller,¹⁴
Rhodes,¹⁵ and Hansen.¹⁶

- C. Claims 4-7, 9-12, 14-16, 19, and 20 stand rejected under 35 U.S.C. § 103(a) in view of the teachings of the references relied on in part B combined with the teachings of Huffer,¹⁷ Penick,¹⁸ Freedman,¹⁹ Lipper,²⁰ Moravick,²¹ Shin,²² Knoerzer,²³ Gottschalk,²⁴ Goldstein,²⁵ Witkowski,²⁶ McClung,²⁷ and Bellet.²⁸

¹⁰ Perry Oshio, U.S. Patent Application Publication 2002/0029697 A1 (2002).

¹¹ Suzuya Shokuhin KK, JP11-137179 (1999) (Derwent Abstract).

¹² Wanda K. Smith, U.S. Patent 5,770,250 (1998).

¹³ Jerry L. Goodwin, U.S. Patent 4,756,939 (1988).

¹⁴ Alan H. Miller, U.S. Patent 4,321,997 (1982).

¹⁵ John C. Rhodes et al., U.S. Patent 4,940,621 (1990).

¹⁶ Richard. E. Hansen, U.S. Patent 4,865,855 (1989).

¹⁷ Scott W. Huffer and Jeffrey M. Schuetz, *Packaging with Incorporated Temporary Tattoo*, U.S. Patent 6,457,585 B1 (2002).

¹⁸ Ib Penick and John K. Volkert, *Promotional Puzzle*, U.S. Patent 4,336,664 (1982).

¹⁹ Benjamin H. Freedman and Emil J. Heggedal, U.S. Patent 2,585,924 (1952).

²⁰ Christopher Lipper, U.S. Patent 6,814,234 B2 (2004).

²¹ Donald W. Moravick and Leon M. Levy, U.S. Patent 3,704,892 (1972).

²² Sang J. Shin, U.S. Patent 4,648,548 (1987).

²³ Anthony Robert Knoerzer et al., *Multi-layer Flexible Package with Removable Section*, U.S. Patent 6,746,743 B2 (2004).

²⁴ Lawrence A. Gottschalk, U.S. Patent 3,835,564 (1974).

²⁵ Daniel Goldstein, U.S. Patent 3,100,642 (1963).

B. Discussion

Findings of fact throughout this Opinion are supported by a preponderance of the evidence of record.

As the Appellant, Kazich bears the procedural burden of showing harmful error in the Examiner's rejections. *See, e.g., Shinseki v. Sanders*, 129 S.Ct. 1696, 1706 (2009) ("Lower court cases make clear that courts have correlated review of ordinary administrative proceedings to appellate review of civil cases in this respect. . . . [T]he party seeking reversal normally must explain why the erroneous ruling caused harm.") (citations omitted). *See also, In re Chapman*, 595 F.3d 1330, 1338 (Fed. Cir. 2010) (discussing the role of harmless error in appeals from decisions of the Board of Patent Appeals and Interferences).

We begin by construing the critical limitations of the claims. We observe first that Kazich does not direct our attention to specific definitions in the 225 Specification of terms used in the claims. Accordingly, we construe the terms using their ordinary meaning, giving them the broadest reasonable interpretation, from the point of view of a person having ordinary skill in the relevant arts, that is consistent with the supporting disclosure. *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). We must not, of course, read limitations from preferred embodiments in the specification into the

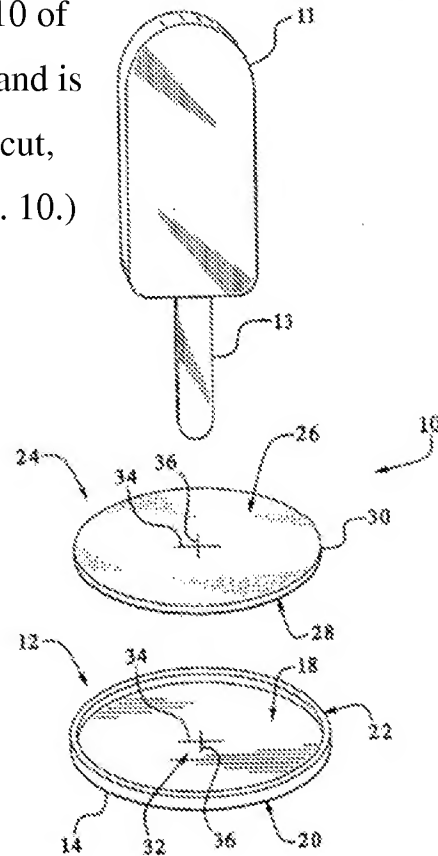
²⁶ Daniel D. Witkowski and Marcia D. Griffith, U.S. Patent 5,676,401 (1997).

²⁷ Karen Therese McClung et al., U.S. Patent 6,755,711 B2 (2004).

²⁸ Ettie B. Bellett, U.S. Patent 2,711,541 (1955).

claims. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1369 (Fed. Cir. 2004).

Figure 1, right, illustrates an apparatus 10 of the invention. Base 12 is circular and planar, and is made from a material that is rigid and may be cut, e.g., with a machine press or die cutter. (Spec. 10.) Cover 24 is made from an absorbent material. Base 12 extends beyond the outer edge 30 of cover 24. Lip 22 is formed integrally on and perpendicularly to the perimeter 14 of base 12. Top layer 24 must be adjacent to but may not overlap lip 22. Finally, a passage (34 or 36) at the aligned centers of cover 24 and base 12 allows stick 13 of frozen confection 11 to pass through both the cover and the base.



{ Fig. 1 shows a base and top layer }

Independent claim 1 describes the apparatus in terms of a base having a bottom layer made from a material that is rigid, and a top layer made from an absorbent material, whereas independent claim 8 recites an “absorbing means covering the top side of the base,” and remaining independent claim 13 recites a method for collecting drips, in which the various components are “provided,” including a “base” and a “cover” that “is an absorbent material.” As neither the Examiner nor Kazich has argued that the claims cover substantially different articles or processes, either in the

abstract or with respect to the applied prior art, we shall assume, without deciding, that the claims cover substantially similar subject matter.

The Examiner finds that the originally filed Specification does not describe a “rigid” bottom or base, in the sense of “not flexible or not bending,” and that there is no description of the thickness of the materials. (Ans. 4.) Accordingly, the Examiner argues, “there is therefore no evidence that appellant has support for a rigid base, in the specification as originally filed.” (*Id.*) Kazich responds that the materials described as being suitable for the base, such as cellulose fiber, plywood, plastic, etc., suffice to support the term “rigid” in the claims. (Br., para. bridging 16-17.)

Whether the written description is satisfied by the original disclosure is a question of fact. *Ariad Pharms., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010)(en banc). As the court explained, the test for an adequate written description “requires an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art. Based on that inquiry, the specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed.” (*Id.*) We resolve questions of fact by the preponderance of the evidence of record.

The claim 1 phrase, “the bottom layer is made from a material that is rigid,” does not necessarily require that the bottom itself be rigid—only that a rigid material be used as a constituent of the base. However, the bottom layer must support the top absorbent layer and an integrally formed lip, as well as drip from the frozen confection, and therefore must have at least that much structural strength. The broadest meaning of the term “rigid” in the

context of the disclosure is thus that the bottom layer be self-supporting, that is, that it retains its shape under ordinary conditions of use. The parallel construction of the claim 1 phrase “the top layer is made from an absorbent material,” and the purpose of the top layer to absorb liquids, further suggests that it is reasonable to interpret the term “rigid” in claim 1 as requiring that the bottom layer itself must be rigid. The Examiner has not come forward with evidence or argument beyond the absence of the word “rigid” in the originally filed Specification. Accordingly, we conclude that the weight of the evidence favors Kazich on this point.

Similarly, Kazich argues that the disclosed function of the lip, to prevent the drips which have pooled on the top side of the base from flowing beyond the perimeter of the base (Br. 16, citing Spec. 10 and 13) supports the description of the lip extending to a point above the top layer. The Examiner’s argument that an outwardly tapered lip not higher than the top layer would accomplish the same function does not make sense, insofar as the Examiner has explained it. It is not apparent how a lip that is not higher than the absorbent material could contain drips that have pooled on top of the absorbent layer. We therefore conclude that the weight of the evidence favors Kazich on this point as well, and we find the Examiner erred in finding that the claims lack an adequate written description.

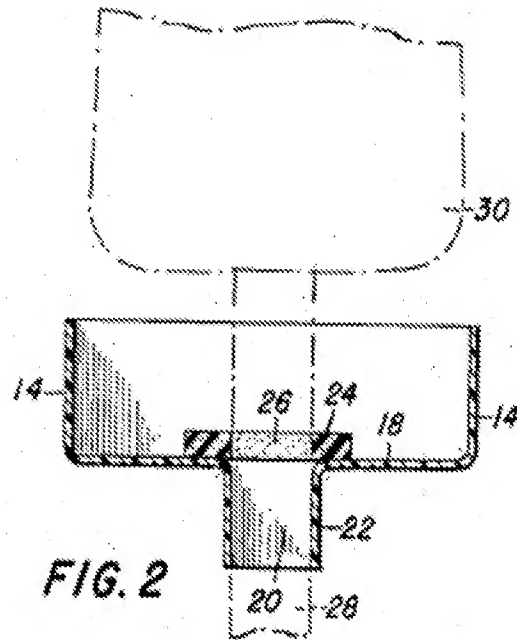
We now turn to the rejections over prior art.

Ackalusky describes a guard device for a frozen confection depicted on the following page. The device comprises a guard 10 with a flat bottom wall 18 integrally connected with upstanding side walls 12 and end walls 14. (Ackalusky col. 1, ll. 52-58.) The bottom and end walls are preferably made

of a vinyl resin such as polyethylene, and can be reused; or they can be made of materials such as cardboard, heavy paper, and molded wood pulp, and can be discarded. (*Id.* at col. 1, l. 60, to col. 2, l. 2.) A rectangular opening 20 is provided in the center of bottom wall 18 (*id.* at col. 2, ll. 3-6), and a sponge rubber block 24 having a slit 26 aligned with opening 20 is positioned over the opening. (*Id.* at ll. 7-12.) In Ackalusky's words, "[i]n use, the stick 28 of a frozen confection . . . 30 is inserted downwardly through the slit 26 in the sponge rubber and through the opening 20 and sleeve 22 in the guard."

(*Id.* at ll. 13-16.) The walls are said to prevent the drippings from running off the sides of the guard, while the resilient sealing action of the sponge prevents drippings from running through the stick opening.

(*Id.* at ll. 16-24.) Ackalusky teaches that the guard can be round, "or any other desired shape and size which will best accommodate shape and size of the confection." (*Id.* at ll. 25-29.)



{Fig. 2 shows a side view of a guard device}

Ackalusky describes the walls of the sponge rubber block as being parallel to the walls of the container 10 (*id.* at ll. 8-10), and the illustrations (Figs. 2 and 3 (not reproduced here)) show substantial space between the edges of the sponge and the walls. As claimed by Ackalusky, the guard container must have "a rigid flat bottom and upstanding preshaped rigid side walls,"

with the “resilient sponge rubber sealing block secured on said bottom wall about said opening.” (*Id.* at ll. 40-45.)

Taylor describes a foldable shield 6 disposed against the base of body 1 and extending “laterally a considerable distance beyond . . . the base of the body to provide a relatively wide margin 7. (Taylor, col. 2, ll. 44-48.) The base is, for example, the base of a chocolate ice cream bar with “the usual stick handle 2” protruding out of the base of the body. (*Id.* at ll. 33-37.) In a preferred embodiment, the shield is made of an upper layer 8, of absorbent paper, and a lower layer 9, of stiffer, nonabsorbent paper. (*Id.* at ll. 60-68.) Taylor teaches that, “[i]f desired, the shield can be made so that only the upper face of the margin 7 is covered with the absorbent layer 8.” (*Id.* at ll. 68-70.)

Because the Examiner relies on the remaining references cited in Rejection B in an essentially cumulative manner, and because Kazich treats them similarly, we need not describe them here.

The Examiner finds that Ackalusky discloses or suggests all limitations of the apparatus and process covered by the independent claims. In particular, the Examiner argues that because Ackalusky employs an absorbent top layer for the art-recognized absorbent function of collecting drips from frozen treats, it would have been obvious to extend the absorbent layer to cover the bottom wall 18. (Ans. 7.) To the extent Ackalusky differs in not describing an upper layer “adjacent” to the lip, the Examiner also relies on Taylor for evidence that it was known to extend an absorbent layer 8 substantially over the lower support layer 6 of a drip guard for a frozen treat. (*Id.*) The Examiner concludes that claims 1, 8, and 13 would

have been obvious in view of the applied references. Regarding dependent claim 2, the Examiner finds that Ackalusky describes plastic as being useful for the bottom layer. (Ans. 8.) Regarding dependent claim 3, the Examiner finds that Taylor describes paper as a suitable absorbent material. (*Id.*)

As for the requirement of claim 17 that the cover be laminated, the Examiner finds that although Ackalusky does not describe such a feature, Taylor describes laminating the absorbent layer to the underlying layer. (*Id.*)

The Examiner finds that the step recited in claim 18, of inserting the stick of a frozen treat into the opening of the cover and base is described by Ackalusky. (*Id.* at 8-9.) The Examiner makes parallel findings that it would have been obvious to modify the shield guard disclosed by Taylor by using more rigid base materials and to provide more conspicuous lips or rims given the teachings of Ackalusky and the other references relied on. (*Id.* at 9.)

Kazich presents arguments for the patentability of the independent claims as a group. (Br. 20-26.) The arguments, however, amount to little more than a recitation of various limitations in the claim followed by a flat denial that any of the applied references disclose or suggest the claimed subject matter. In particular, Kazich (*id.* at para. bridging 23-24) does not explain why the Examiner's reasoning that it would have been obvious to vary the size of the sponge is faulty. Nor does Kazich explain why Taylor's teachings that the absorbent layer can cover substantially all of the base layer would not have suggested covering the bottom wall 18 of Ackalusky's device with an absorbent layer. Indeed, Taylor's additional teaching that the extent of the absorbent layer can be varied stands as further evidence that

such variations were known to persons having ordinary skill in the art. We find Kazich's flat denials that there are any teachings in the references on which the Examiner relies of a rigid base (*id.* at 24), or of a lip higher than the top layer (*id.*), or that the bottom layer or base extends beyond the outer edge of the top layer without overlapping the absorbing top layer (*id.* at para. bridging 24-25) escape being frivolous solely if considered to be arguments that those additional features are not taught or suggested *in combination* with an absorbent top layer that extends to be adjacent to the vertical side walls described by Ackalusky. But Kazich has failed to demonstrate harmful error in this aspect of the Examiner's rejections.

Kazich's arguments that there is no motivation to combine the references (Br. 25) amount to mere pleading. Kazich has not come forward with any credible evidence that the references cited by the Examiner are not in similar areas of art (e.g., drip collection, food packaging or packaging more generally) or that the references are not concerned with similar problems, such that persons having ordinary skill in the art would not have considered the teachings to be relevant to problems related to drip guards. Certainly no such case has been made against the combination of teachings from Ackalusky and Taylor, which are both concerned with frozen confection drip guards having an absorbent upper layer and a more rigid lower layer.

In short, Kazich has failed to demonstrate harmful error in the Examiner's evidence and arguments that the subject matter covered by independent claims 1, 8, and 13 would have been obvious.

As for the remaining separately argued claims subject to Rejection B, Kazich does not deny that Ackalusky describes a plastic base layer (claim 2), or that Taylor describes a paper absorbent layer (claim 3). Nor does Kazich explain why Taylor does not describe laminating the paper absorbing layer to the relatively rigid, stiffer, nonabsorbent paper lower layer.²⁹ Nor does Kazich explain why Ackalusky or Taylor do not teach sticking the stick handle of the frozen treats through the cover and base layers of the guard devices. Again, these objections escape being frivolous solely if based on the erroneous conclusion that the subject matter of the independent claims is not rendered obvious.

Rejection C deals with claims that require the presence of indicia such as temporary tattoos, removable partitions, stickers, and labels on the base (claims 4-7, which depend from claim 1, and claims 15, 16, and 20, which depend from claim 13) or on the absorbent cover (claims 9-12, which depend from claim 8, and claims 14 and 19, which depend from claim 13). Kazich denies that the independent claims would have been obvious, a position that we have rejected, and argues further that there is no motivation to combine the references. (Br. 36-37.) Kazich, however, does not explain why the Examiner's findings that prior art separable washable tattoos (e.g., Huffer), or cut-outs (e.g., Penick, interfitting puzzle pieces), or stickers and labels (e.g., Knoerzer) on containers said to be especially suitable for food items would not have suggested that such features be added to the visible

²⁹ In this regard, we note that Ackalusky describes "securing" the absorbent sponge to the base, fully meeting the Examiner's presumption (Ans. 8, ll. 16-17) that the term "laminated" in the claims "means to the base".

surfaces of frozen confection-holders such as the drip guard devices taught by Ackalusky or Turner. Kazich has not cited any credible evidence that the level of creativity of persons having ordinary skill in the art is so low. The various references cited by the Examiner point strongly to a significantly higher level of creativity.

Finally, we note that Kazich has not argued for patentability based on secondary considerations such as unexpected results or commercial success.

C. Order

We REVERSE the rejection of claims 1-20 under 35 U.S.C. §112(1) for lack of written description of a “rigid” bottom or base, and for lack of written description of a base lip that extends “above” the top layer of the drip collector.

We AFFIRM the rejection of claims 1-3, 8, 13, 17, and 18 under 35 U.S.C. § 103(a) in view of the combined teachings of Ackalusky, Taylor, Perkins, Pagnini, Blant, Rizzuto, Oshio, Suzuya Shokuhin, Smith Goodwin, Miller, Rhodes, and Hansen.

We AFFIRM the rejection of claims 4-7, 9-12, 14-16, 19, and 20 under 35 U.S.C. § 103(a) in view of the teachings of the references relied on *supra*, combined with the teachings of Huffer, Penick, Freedman, Lipper, Moravick, Shin, Knoerzer, Gottschalk, Goldstein, Witkowski, McClung, and Bellet.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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